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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

CYNTHIA B. AVENS, Plaintiff, v. FARIS C. DIXON, JR., ET AL., Defendants.)))))))	DOCKET NO. 4:24-CV-51-M-RN
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TRANSCRIPT OF MOTIONS HEARING
BEFORE MAGISTRATE JUDGE ROBERT T. NUMBERS, II
TUESDAY, OCTOBER 8, 2024; 2:05 PM
GREENVILLE, NORTH CAROLINA

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1 P R O C E E D I N G S

2 THE CLERK: All rise. This is United States District
3 Court for the Eastern District of North Carolina is again in
4 session. The Honorable Robert T. Numbers, II, presiding.
5 This Court will come to order. You may be seated.

6 THE COURT: Good afternoon, everyone.

7 I'm United States Magistrate Judge Robert Numbers,
8 and we are here in the United States District Court for the
9 Eastern District of North Carolina, sitting in Greenville for
10 a hearing in the case of Avens v. Dixon and others, case 4:24-
11 CV-51.

12 Ms. Cynthia Avens, the pro se plaintiff, is here
13 today.

14 Good afternoon, ma'am.

15 MS. AVENS: Yes, sir.

16 THE COURT: All right. And would defense counsel
17 please identify themselves and note who they represent.

18 MS. AGOSTO CARREIRO: Your Honor, my name is Chris
19 Agosto Carreiro, and I represent DA Faris Dixon.

20 MR. LINDSLEY: May it please the Court, Jeremy
21 Lindsley, North Carolina Department of Justice, here on behalf
22 of Dr. Kelly.

23 MR. MCCLURG: Hello, Your Honor. Daniel McClurg,
24 from K&L Gates, on behalf of ECU Health.

25 THE COURT: All right. Good afternoon, everyone.

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1 So we have a number of motions on the docket today.
2 Each of the defendants has filed a motion to dismiss Ms.
3 Avens' claims against them. Ms. Avens has filed a motion to
4 determine the validity of a settlement agreement that was
5 apparently entered previously. And the ECU defendants have
6 filed -- or defendant has filed a motion to seal a document
7 that Ms. Avens filed. I want to begin with those last two
8 motions because I think they're more narrow issues there.

9 Ms. Avens, I want to begin with you and ask, with
10 respect to the -- you filed a document that's entitled Motion
11 to Determine Validity and Applicability of 2016 Settlement
12 Agreement and address ethics and tactics of opposing counsel.
13 The ECU defendants responded by indicating they didn't know
14 what motion -- what rule of civil procedure you were
15 proceeding under. They presumed it was a summary judgment
16 motion, and you replied saying, it's not a summary judgment
17 motion. So I'm trying to figure out, for myself, what rule
18 you're proceeding under, because depending on what rule you're
19 proceeding under, that determines how I assess that motion.
20 So I'm hoping you can clarify that for me.

21 MS. AVENS: Yes, sir. If it pleases the Court. I
22 filed that motion under 7(b) of the Federal Rule of Civil
23 Procedure.

24 THE COURT: Okay. So I appreciate that. And I know
25 you're not a lawyer, so I understand some of this is confusing

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1 to you or you may not understand it as well as the attorneys
2 do. Rule 7(b) is just kind of a general rule that allows
3 people to file motions and tells you what to kind of put in a
4 motion. And so I'm trying to figure out what are the other
5 rules you might be proceeding under. I mean, maybe if you
6 don't have a particular rule -- I mean, if you have a
7 particular rule in mind, let me know. If you don't, let me
8 know that too, and that'll tell me how to proceed.

9 MS. AVENS: I don't see a particular rule other than
10 filing the motion under 7(b).

11 THE COURT: All right. And I know in here you say
12 what you'd like the Court to do. On pages 10 and 11 of that
13 motion, you say you want the Court to determine the validity
14 of the agreement, rule on the relevance of the agreement to
15 the case at hand, decide whether the agreement has the ability
16 to dismiss your amended complaint, determine whether the
17 confidentiality of the agreement has been waived, decide if
18 the agreement should remain on the docket as an exhibit in its
19 current, unredacted form, and determine whether the actions of
20 defense counsel, including the use of threats and intimidation
21 and the imposition of a three-day compliance window constitute
22 coercion or improper conduct that warrants further judicial
23 scrutiny. Those are the things you want the Court to do with
24 your motion?

25 MS. AVENS: Yes, sir. The motion, I had not

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1 addressed it in my original complaint. And this is not a
2 motion for a summary judgment, because a summary judgment, to
3 my understanding, would determine the outcome of the case.
4 And this is just one piece of the case. So I wanted to
5 address this issue, because in my original complaint, I did
6 not address the settlement agreement. I only mentioned that I
7 believe that ECU Health had obstructed justice, both civilly
8 and criminally, in their response for ECU Health's counsel.
9 In their response, they introduced the settlement agreement as
10 a claim -- as an affirmative defense, I believe, because they
11 said that it appeared that my case seemed to be a healthcare
12 liability case rather than a civil rights case.

13 And so to address the healthcare liability that they
14 tried to mischaracterize my complaint as, then they introduced
15 the settlement agreement as having the weight to bar my
16 current action, which is not a healthcare liability case, it's
17 a civil rights case.

18 So in doing that, when I amended my complaint, then I
19 addressed the agreement further. And in their response again,
20 they made statements saying how that agreement barred claims
21 to this action. That agreement was just in reference to the
22 healthcare -- the wrongful death settlement and Keisha White's
23 health care. This case is the civil rights violations that
24 has occurred over the last ten years after her death, as I
25 have attempted to get criminal justice.

Colloquy

1 THE COURT: Okay. Thank you.

2 MS. AVENS: So it was brought in inappropriately
3 anyway, because this is not a healthcare liability case, and
4 I've made that clear.

5 THE COURT: Thank you.

6 Mr. McClurg, let me just ask you straight out, is
7 your client depending on the settlement agreement at this
8 stage of the case to dismiss anything?

9 MR. MCCLURG: No, Your Honor.

10 THE COURT: All right. Let me ask about the motion
11 to seal. And the background for that is that among the
12 documents Ms. Avens filed at -- what's -- docket entry 57-1
13 was a document that she titled Wrongful Death Settlement and
14 Release. It does appear to be a settlement agreement, as the
15 underlying document is entitled Settlement Agreement and
16 Release in Full. And ECU defendant now claims that that
17 should be kept under seal.

18 Mr. McClurg, I'm somewhat confused because, as I look
19 at that document, at 57-1, it's not executed by anyone. It
20 appears to solely be a draft document that no one has entered
21 into. So even if it does contain some sort of confidentiality
22 clause, if it's not executed and it's not enforced, what basis
23 is there for keeping it under seal at all?

24 MR. MCCLURG: So in that draft agreement, there's no
25 trigger. There's no confidentiality provision that is

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1 effective. However, it mirrors a final agreement which was
2 entered, which includes a confidentiality provision. And
3 though there are slight differences between the draft version
4 that has been filed on the public record and the filed final
5 version, which was ultimately executed, the confidentiality
6 provisions are the same.

7 THE COURT: Well, have you -- I mean, is that final
8 executed agreement in front of the Court in any way?

9 MR. MCCLURG: It is not yet, Your Honor.

10 THE COURT: So how can I decide what the bounds of
11 confidentiality are?

12 MR. MCCLURG: We would be happy to submit a copy for
13 in camera review or under seal, if that would make your job
14 easier.

15 THE COURT: Well, I mean, if I don't have it in front
16 of me, I can't decide anything. So that --

17 MR. MCCLURG: Understood.

18 THE COURT: My job is pretty easy, actually, without
19 it in the record, to be honest. But the other question I have
20 is are you telling me the confidentiality provision is
21 effectively the same in the final agreement versus in this
22 agreement?

23 MR. MCCLURG: Yes, Your Honor. I believe it's a
24 mirror image.

25 THE COURT: So as I review the paragraph here about

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1 confidentiality, what I've got here says, "The terms of the
2 settlement of this matter shall remain confidential as to
3 settlement amount and shall not be disclosed by any party or
4 any parties' counsel to anyone." And then it goes on a little
5 bit. So if that is what's in the final settlement agreement
6 the parties agreed to, why does the whole document need to be
7 sealed?

8 MR. MCCLURG: So there are restrictions later in
9 the -- admittedly, it's a very long confidentiality provision.
10 It's about a quarter of the agreement. However, there are
11 restrictions later within the confidentiality provision which
12 are specific to Ms. Avens as the signatory on that agreement.
13 And it includes components of the agreement beyond just the
14 settlement figure. So that --

15 THE COURT: Well, so as I review it -- and you can
16 point me to what you think controls here -- I mean, in that
17 first paragraph, at the end, is a sentence that says "The
18 undersigned therefore agrees that other than to say the matter
19 has been resolved, if asked, either Cynthia Avens, as
20 administrator of the estate of Keisha White, Robert White, or
21 any attorneys will disclose any information whatsoever
22 concerning this settlement amount."

23 And then there's a restriction further on that the --
24 that "Ms. Avens and her attorneys will not disclose
25 information related to the allegations or contentions in this

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1 litigation, the amount of settlement, or the terms of the
2 release on any website", and it lists several popular
3 websites. There are a lot of other words there, but those are
4 the only restrictions I see. And I'm -- again, I'm still
5 struggling on how to -- how this relates to sealing the entire
6 docket.

7 MR. MCCLURG: Understood, Your Honor. And I don't
8 believe we would have an issue with just filing a sealed
9 version of the document with respect to the confidential
10 settlement figure sum.

11 THE COURT: Getting down to the merits of the motion.
12 You know, there's a complicated test that the Fourth Circuit
13 requires courts to apply. It's so important that, earlier
14 this year, the Fourth Circuit issued a writ of mandamus
15 overturning a decision to place documents under seal. So it's
16 something that I take very seriously in light of how seriously
17 the Fourth Circuit took it, given the extraordinary standard
18 you have to meet to get a writ of mandamus.

19 The submission from your client didn't seem to
20 address whether this qualifies as a judicial document, whether
21 the common law or First Amendment right of public access
22 applies, or specifically how you overcome either of those
23 rights. And so without that information, I can't grant the
24 motion, so.

25 MR. MCCLURG: I will say, Your Honor, that I don't

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1 believe that there is a public interest in this document being
2 on the public record. It's not relied upon, and it's not
3 related to any of the claims that are asserted in this case.
4 Our motion to dismiss does not cite it as a basis for
5 dismissal at this point.

6 And on the other side, there's a countervailing
7 interest or harm to the parties if it is allowed to remain on
8 the public record. The confidentiality provision was a core
9 component of that agreement. As I mentioned, it's about a
10 quarter of the entire settlement agreement. And there's also
11 potential harm to Ms. Avens in that there's an enforcement
12 mechanism contained within the confidentiality provision that
13 can be invoked for breaching that section.

14 THE COURT: And certainly there is a liquidated
15 damages clause in there. And that gave rise to a question for
16 me, which is, if there is a liquidated damages clause that
17 your client can invoke, why does it need to be sealed?

18 MR. MCCLURG: Frankly, Your Honor, because we don't
19 want to bring a claim against Ms. Avens, if possible.

20 THE COURT: Fair enough. I mean, I get that and I
21 get the challenges of bringing a claim to recover, you know,
22 this amount of liquidated damages. But it seems that, to some
23 extent, your client made a decision that that was a remedy for
24 them, if this is publicized. It's been publicized to some
25 extent. And so there are -- one of the questions I have to

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1 answer, whether remedy short of sealing or restricting public
2 access that are appropriate, and your client seems to have put
3 forward one in the agreement. So I don't know if sealing is
4 appropriate, given that your client does have the option to
5 sue.

6 MR. MCCLURG: I think the more reasonable approach of
7 the two -- rather sealing versus having ECU Health bring some
8 sort of claim for the liquidated damages -- I think the more
9 reasonable of those two approaches would be to have the
10 document sealed, so we don't have to go down that road.

11 THE COURT: Thank you.

12 MR. MCCLURG: Yes, Your Honor.

13 THE COURT: Ms. Avens, anything you wish to say on
14 the motion to seal?

15 MS. AVENS: Yes, sir, I do. Again, the ECU Health is
16 trying to use the document as a sword and shield, as I
17 referenced in my response.

18 THE COURT: Well, but Mr. McClurg has said -- I asked
19 him, is your client relying on this to dismiss anything at
20 this point? He said no.

21 MS. AVENS: Yes, sir, I understand that, but there
22 was still statements in their motions to dismiss saying that
23 this would bar my current claims. And he -- they also
24 mentioned the consideration of it in a footnote, saying how
25 that the amended complaint is silent on the consideration of

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1 the agreement. This is in the public record. So I introduced
2 the agreement, the copy that I could find because I cannot
3 find my sealed copy. I made a note that, if I could find
4 it -- I mean my signed copy.

5 I'm sorry. I made a note that, if I could find it,
6 then I would provide it during the discovery phase. But I
7 also was aware that ECU Health would have a copy and could
8 also argue, if I submitted something, that had been altered in
9 any way. But they introduced the agreement into the
10 discussion on public record. They introduced the
11 consideration into the public record. Now they want to remove
12 it after I have used it to argue against statements that they
13 made.

14 And whereas ECU Health is concerned about public, I
15 guess, opinion of this being -- of this document on the public
16 record because these other statements was made, if the public
17 could also assume that I'm bringing a frivolous case, because
18 it says right here, she signed an agreement that she
19 wouldn't -- she can't bring another claim. But yet there's
20 nothing from me on the public record to support that that's
21 not what this agreement can do for this case. So it's more
22 than just about their reputation on the public docket; it's
23 mine too.

24 So I had not addressed -- I had not introduced
25 anything as far as, like I said, the original complaint did

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1 not bring this into the conversation. Their response did. So
2 then I put it in my amended complaint, and they brought it
3 back into the conversation by adding the confidenci -- I mean,
4 the consideration into the public conversation.

5 After I did that, then that's when they sent the
6 emails and the letters telling me that they wanted me to
7 strike the document because of the breach of confidentiality
8 and then filed the motion to seal the document, claiming that
9 they had asked me to seal. They never asked me to seal. They
10 asked me to strike the follow-up emails asking me to remove
11 which both of those are different than sealing a document.
12 They never asked me to agree to seal.

13 THE COURT: Thank you. Let me take those two matters
14 under advisement for the time being. Let's move on to the
15 motions to dismiss.

16 Ms. Avens, I just want to give you the opportunity to
17 be heard first, even though they're the defendants' motion.
18 So I'm happy to hear anything you wish to say. I've got some
19 particular questions, but I want to give you the opportunity
20 to be heard on your position on these motions to dismiss
21 first.

22 MS. AVENS: Yes, sir. Address all of the arguments
23 that was made or?

24 THE COURT: Well, I've read everything the parties
25 have submitted. If there are particular points you want to

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1 make, I'm happy to hear those. You don't need to go over
2 everything because I've read everything already. But if there
3 are particular points you want to make or particular things
4 you want to say, I'm happy to give you the opportunity to do
5 so.

6 MS. AVENS: Would it be okay to let them go first?
7 Because that's how I practiced.

8 THE COURT: Sure. Sure. I mean, I have different
9 questions for each side that -- and I'll certainly hear from
10 everyone. In that case, let's -- I'll start with the Dixon
11 motion to dismiss.

12 And Ms. Avens, I'm going to start with you with a
13 couple of questions. There's a discussion in these briefs
14 about whether you have standing, the legal right to sue, to
15 compel the DA to prosecute someone. That's the argument that
16 Dixon makes in his motion. And you respond and say, I'm not
17 trying to get a prosecution. I'm trying to get an
18 investigation. And I'm trying -- if the Court lacks the
19 ability to compel the DA to prosecute someone, why is there a
20 legal right for you to have the DA to investigate someone?

21 MS. AVENS: Well, sir, this case is a civil rights
22 case, not a case to compel investigation or prosecution. And
23 it's about the civil rights that were violated in his
24 decision -- in the decisions that he has made and failures
25 that he has made.

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1 THE COURT: Yeah. I guess what I'm getting at is
2 even if you say it's a civil rights case, like you couldn't --
3 you would have a very, very difficult time bringing a civil
4 rights case, saying your civil rights or your daughter's civil
5 rights were violated by the DA's decision not to prosecute the
6 nurse here.

7 So what I'm trying to get at is, if we can't -- if
8 you don't have a legal right to make the prosecutor do the
9 top -- the thing that's really the prosecutorial authority to
10 bring criminal charges, why does anyone have the authority to
11 seek to try to have the DA do an investigation, which
12 obviously precedes any sort of criminal charges?

13 MS. AVENS: Well, he took that upon himself, Your
14 Honor. He chose to reopen the case when -- when I contacted
15 him in 2019. With that decision, comes the expectation of a
16 fair investigation. And that is not what he did. And I'm
17 just now finding out this year that he accepted reports from
18 the SBI and the Greenville Police Department, where they
19 didn't even interview witnesses.

20 And I just happened to find some contact information
21 regarding former SBI Agent Jennifer Matherly and contacted
22 her. And she revealed in a recorded conversation that the
23 hospital did not make personnel available for them to
24 interview. It's not about forcing Attorney Dixon -- or
25 District Attorney Dixon into investigation. It's because he

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1 volunteered to take on that role and then how he handled it
2 was a blodged [sic] investigation.

3 But you would expect, because he did say that he
4 would look into it and handle it, for it to be handled fairly.
5 And you don't expect for the District Attorney to accept half
6 complete or incomplete reports from law enforcement. You
7 don't expect the District Attorney to claim that he has
8 evidence that he does not have. And that's exactly what he
9 did when he claimed in 2022 to have a report from Dr. Karen
10 Kelly that he did not have.

11 So it goes beyond trying to force or have a right to
12 an investigation or to prosecution. Once he decides to move
13 forward in that direction, then there -- you expect it to be
14 done correctly. You expect it to be done appropriately. You
15 expect it to be done fairly. And that was not done in this
16 case.

17 THE COURT: Thank you.

18 Is it Ms. Carreiro?

19 MS. AGOSTO CARREIRO: Agosto Carreiro, Your Honor.

20 THE COURT: All right. So again, I've gone over the
21 lay of the land here. Your motion to dismiss -- your client's
22 motion to dismiss said no right to compel -- "no standard to
23 compel a prosecution." Ms. Avens responds -- is saying, I'm
24 not trying to compel a prosecution. I'm trying to compel
25 investigation. And there was no reply brief filed. So I've

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1 got no response to you -- from your client or you about that
2 argument. So I want to give you the opportunity to address
3 that.

4 MS. AGOSTO CARREIRO: Thank you, Your Honor.

5 With respect to a citizen's right to compel an
6 investigation, whether it's a police department or the DA's
7 office, we're not aware of any case law, any state or federal
8 statutes that would give a citizen a Constitutional right to
9 demand an investigation by an elected district attorney or his
10 jurisdiction. And in fact, the responsibilities and
11 obligations of a district attorney in North Carolina are set
12 by the Constitution. And within those responsibilities and
13 obligations, nowhere does it say that they're required -- a DA
14 is required to initiate, continue, open, reopen any
15 investigations with respect to an alleged criminal offense.

16 So because there's no Constitutionally protected
17 right to initiation of a prosecution, I think, one, we were
18 relying on the fact that there really isn't any case law or
19 statutory obligation to make an investigation and, two,
20 analogous to initiating a prosecution, there's no right here
21 for Ms. Avens to compel the DA's office to initiate an
22 investigation.

23 THE COURT: So Ms. Avens indicates that there is --
24 the lawyers would call it an assumption of the duty, right?
25 That your client has assumed the duty to do this in a

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1 constitutionally appropriate manner once he chooses to
2 investigate something. How do you respond to that argument?

3 MS. AGOSTO CARREIRO: Well, we would characterize DA
4 Dixon's actions not as investigating the matter, but reviewing
5 the investigations that were done by other agencies. So in a
6 letter that DA Dixon provided to Ms. Avens, he kind of laid
7 out the five or six categories of information that he
8 reviewed. And three of those, Your Honor, were an
9 investigative report that was provided by the Greenville
10 Police Department, one that was provided by a North Carolina
11 SBI agent, and one investigation that had been conducted by
12 the North Carolina Department of Health and Human Services.
13 And so it was in review of those investigative files, in
14 addition to, I believe, it was the ME's report and some
15 medical files that led DA Dixon to determine that there was no
16 criminal offense. There had been no crime committed against
17 Ms. Avens' daughter and that there was not going to be any
18 subsequent prosecution in that case.

19 THE COURT: At this phase of the case, I have to take
20 the factual allegations and the complaint as true. And I
21 understand all three defendants' clients may dispute some or
22 all of what Ms. Avens has alleged, and that's to be fleshed
23 out if this case proceeds to discovery. But the complaint
24 seems to allege that DA Dixon was engaged in additional
25 investigatory activities, sending things to the ME, waiting on

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1 the ME's report, you know, things of that nature. So is that
2 not investigatory in nature?

3 MS. AGOSTO CARREIRO: Well, it would be our position
4 that, no, Your Honor, those aren't investigatory in nature.
5 Those are actions that would be protected by absolute
6 prosecutorial immunity, because it is, again, part of the
7 examination of the evidence and other information -- evidence
8 and investigation that was done by another party.

9 That case law comes from Imbler v. Pachtman and other
10 related cases, Your Honor. To the extent, however, that Your
11 Honor would view some of that ancillary conversation with the
12 ME's office as some kind of investigation, one, I would
13 caution against that because a prosecutor, in reviewing
14 evidence that's compiled by somebody else, will often have to
15 contact a witness and get clarification of the evidence or
16 clarification about their statements. It's not uncommon, and
17 I don't think that that transforms an evaluation of evidence
18 into the gathering of evidence, Your Honor.

19 And further, to the extent that it is investigative
20 and that Your Honor determines that it's not protected by
21 absolute prosecutorial immunity, I believe that the standard
22 under qualified immunity would apply and that those
23 allegations of an investigation would still be barred under
24 qualified immunity.

25 I would like to state, however, Your Honor, that

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1 while Ms. Avens may allege that an investigation occurred, I
2 don't believe that the individual facts that she cites support
3 that conclusion, Your Honor.

4 Again, I would say that any information that DA Dixon
5 subsequently received from the medical examiner, you know,
6 that would just be in furtherance of understanding the
7 original finding on the death certificate that it was -- that
8 Ms. Avens' daughter passed due to natural causes. But would
9 not be the elected DA actually standing or stepping into the
10 shoes of a detective, and in fact, investigating a potential
11 crime. Does that address, Your Honor, the question that you
12 had?

13 THE COURT: Yes, I mean, I think I -- I'm trying to
14 look at the complaint. You know, obviously this is a very
15 lengthy complaint with lots of detail in it.

16 MS. AGOSTO CARREIRO: Yes, Your Honor.

17 THE COURT: Unlike many pro se complaints that we all
18 are familiar with, this --

19 MS. AGOSTO CARREIRO: Yes.

20 THE COURT: -- this one goes to great length. And I
21 guess, so your position is that -- I take it that this is --
22 the DA's function here was reviewing evidence --

23 MS. AGOSTO CARREIRO: Yes.

24 THE COURT: -- and ancillary calls to the medical
25 examiner or others for clarification is not so investigatory

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1 in nature that it moves it outside of the scope of
2 prosecutorial immunity?

3 MS. AGOSTO CARREIRO: Yes, Your Honor.

4 THE COURT: Thank you.

5 MS. AGOSTO CARREIRO: Thank you.

6 THE COURT: Ms. Avens, I'll allow you to respond to
7 that if you'd like to do so.

8 MS. AVENS: Yes, sir. Thank you. I am trying to
9 find it in the transcript of the phone call, because Mr. Dixon
10 identified that any response from Dr. Kelly would be part of
11 the investigation. He identified what he was doing as an
12 investigation into recorded phone calls. So I argue that the
13 steps that he was taking as, out of his own mouth, he was
14 involved in an investigation, an investigation that he chose
15 to enter into, that I did not have to force him into or compel
16 him into, against whatever right that I don't have to do so.
17 He agreed, when I asked him to reopen the case because the
18 former DA had not moved, that she would be more in line with
19 somebody, that I couldn't force to do anything because I
20 couldn't even hardly talk to her. But when I spoke with DA
21 Dixon, he said that he would look into the matter. He
22 identified what he was doing as an investigation in the
23 recorded phone calls.

24 And absolute immunity does not kick in until he has
25 identified probable cause. He can review anything that he

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1 wants to. He can take whatever the steps that he needs to do
2 to try to even determine his charging decision, but absolute
3 immunity does not kick in until he has identified probable
4 cause. And that's going by -- I don't know the name of the
5 court case, but it's one of the same ones that the defense
6 mentioned in their defense. And when I read further into the
7 case, then I understood that absolute immunity does not apply
8 prior to establishing probable cause, which he never did. So
9 he's not protected by that.

10 THE COURT: Thank you.

11 Ms. Carreiro, on that probable cause point, there is
12 some case law that indicates that as kind of the dividing line
13 between when prosecutorial immunity applies and when it
14 doesn't. So you know, how do you respond to that argument?

15 MS. AGOSTO CARREIRO: The first thing that I would
16 say, Your Honor, the case that we referred to and I believe
17 that Ms. Avens is referring to is Buckley v. Fitzsimmons. And
18 that site is 509 U.S. 259. That was decided in 1993.
19 Specifically in that case, at 272, the Court says that "The
20 duty of the prosecutor in his role as advocate for the State
21 involves actions preliminary to the initiation of prosecution
22 and includes actions outside of the courtroom."

23 It also includes, "professional evaluation of
24 evidence assembled by the police." This is exactly the kind
25 of conduct that DA Dixon engaged in, and it's exactly the type

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1 of conduct that absolute prosecutorial immunity is meant to
2 protect. So the evaluation of evidence assembled by the
3 police or other investigatory bodies is a preliminary matter
4 to the initiation of a prosecution.

5 And so while there's some language that Ms. Avens
6 refers to, as far as, you know, here's this clear-cut, black-
7 and-white line as to before or after probable cause. In the
8 same case, Your Honor, there are nuances that the Court finds.
9 And one of those is it's not really probable cause because you
10 have to evaluate that evidence before probable cause is found,
11 by the DA, anyway. There may have been a magistrate judge or
12 someone else who issued a warrant and they made a
13 determination about probable cause. But at the end of the
14 day, it's the DA who has to review the evidence. It's the DA
15 who has to bring the case if they're going to bring it.

16 And so I believe that it's not as clear cut as Ms.
17 Avens is representing to the Court. I think that case and
18 subsequent cases that we cited in the brief show that, you
19 know, there is some nuance between that border of probable
20 cause and no probable cause. And a district attorney, a
21 prosecutor needs to have the flexibility and needs to have the
22 discretion to review that evidence before deciding whether to
23 move forward with prosecution.

24 I would also just like to state that Ms. Avens
25 characterizes DA Dixon's actions as reopening a case. And I

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1 just want to clarify that there was no case to reopen. There
2 wasn't a case, in fact. Nothing had been charged. What there
3 was, was Ms. Avens, as a citizen, requesting some type of
4 review or investigation by the earlier administration under DA
5 Robb. And then again, she visited DA Dixon when he became the
6 DA in 2019. So reopening or opening a case, Your Honor, I
7 don't think that's an accurate representation of what was
8 really happening here. But that would be my response to the
9 Buckley case, Your Honor.

10 THE COURT: Thank you.

11 Ms. Avens, in your response, you cite the Love case
12 to try to establish standing to pursue these claims. In that
13 case, the Court discussed whether there was a coverup that
14 prevented decedents from pursuing a claim related to the death
15 of their loved one. And I'm trying to figure out what claims
16 have you been hindered in pursuing regarding your daughter's
17 death by the defendant's actions?

18 MS. AVENS: Sir, I believe the Love case was the case
19 where the loved one's death had been covered up?

20 THE COURT: Yes.

21 MS. AVENS: Okay. And in that case -- I'm just
22 trying to recall from memory -- they determined because the
23 family brought the suit under the estate of their loved one
24 and tried to bring a suit -- a civil rights case for the loved
25 one through their estate. And it was determined that, while

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1 the court does not agree, or some other word similar to that,
2 to the circumstances of the person's death being, you know,
3 covered up, that the court does not recognize civil rights of
4 a decedent. But then it went on to say that the family were
5 the actual victims of the coverup, not the deceased son. And
6 that that's where I -- that was the angle that I was using
7 that case.

8 THE COURT: Fair enough. As I look at that case,
9 I've got it in front of me, the Court says in part,
10 "Plaintiffs do not allege that their claims against the other
11 defendants in the present lawsuit have been hindered,
12 devalued, or otherwise damaged by the coverup. Nor do they
13 allege that they were prevented or otherwise hindered in
14 filing a state law wrongful death suit." And so because of
15 that, the Court found there was no 1983 claim, no
16 Constitutional violation.

17 So what I'm trying to figure out here is what claims
18 have you been unable to bring, related to your daughter's
19 death, in light of what you claim the defendants have done?

20 MS. AVENS: Well, for one, the agreement that I
21 entered into in 2016 was not a fair agreement because it was
22 coerced and it was information that was withheld that ECU
23 Health should or was aware of since they did do an internal
24 investigation after my daughter's death. But there was
25 information that was revealed in the North Carolina Board of

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1 Nursing report that had not been revealed previously, even by
2 the Department of Health and Human Services when they
3 investigated. So that agreement was not even entered into
4 without coercion or fraud or withholding of information. And
5 it was more or less forced because of those circumstances.

6 The case that I have now, had I known that ECU Health
7 prevented or withheld their personnel from being interviewed
8 during the 2014 -- and let me clarify. During the November
9 2014 investigation between the SBI Agent Matherly and Det.
10 Alvaro Elias of the GPD, something may -- could have been done
11 prior to this case if that information had been revealed. I'm
12 just learning it this year when I was able to contact Agent
13 Matherly.

14 So those are the two that I -- you know, cases that
15 could have either been handled differently or handled sooner
16 than now but couldn't because information has been withheld.
17 You know, it's the coercion that I mentioned in the 2016
18 wrongful death settlement.

19 Prior to that, I had already hired -- fired two
20 attorneys because I felt like they were representing the
21 hospital in the wrongful death case and not representing me.
22 In November 2015, that's when I fired the second one, and I
23 hired a law firm from Charlotte. And they told me -- when I
24 first spoke to them, they said, well, you have -- the statute
25 of limitations runs out on May 10th. This was close to

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1 Thanksgiving. He said normally we do not take cases that have
2 less than six months left on the statute of limitations. And
3 he said, you will be hard pressed to find another firm to take
4 this type of case on for less than six months. But he agreed
5 to do it.

6 So fast-forward. The Board of Medicine had completed
7 their investigation by July 2015. I requested a copy of their
8 report. They would not release it. In November 2015, the
9 nurse signed the published consent order. I, again, asked for
10 a copy of this report. They would not release it. I asked in
11 December. They would not release it. January, I sent the
12 email and their staff attorney responded, it'll be another 45
13 days. 45 days coincidentally landed on March 1st, the date of
14 mediation. I did not get it before mediation. I got it a few
15 days after, but this information was withheld because it took
16 the Board of Nursing eight months to release this report.

17 THE COURT: What does that have to do with any of
18 these defendants?

19 MS. AVENS: I'm leading up to the -- or we're not
20 talking about ECU Health?

21 THE COURT: Right. But you're saying the Board of
22 Nursing wouldn't give you the documents. That sounds like --
23 I mean, if that's a problem, that's the Board of Nursing
24 problem. So what does that have to do with this lawsuit?

25 MS. AVENS: Okay. Well, I did attach that to ECU

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1 Health due to their -- there was information in that report
2 that they did not reveal. And the day of mediation when we
3 were discussing different, you know, numbers to settle on and
4 I was hesitant to agree to anything, then that's when the
5 mediator comes back and says, well, they have said that, if
6 you take this to trial and don't settle, then they're going to
7 tell the jury that your daughter refused some of her Lovenox
8 shots. A Lovenox is a blood thinner.

9 THE COURT: All right. So I mean, what happens in
10 mediations is largely inadmissible in court. So I don't want
11 to get into that. I mean, I take it you brought a wrongful
12 death lawsuit against ECU Health and some other people, right?

13 MS. AVENS: Well, just ECU Health. That was in 2016.

14 THE COURT: And you settled that case?

15 MS. AVENS: Yes.

16 THE COURT: Okay. And then the other thing you've
17 talked about is -- ECU not making people available to the
18 Greenville PD, is that an issue? Why is that an issue?

19 MS. AVENS: I didn't hear you.

20 THE COURT: I've asked you how you were impeded in
21 pursuing claims by the defendants' actions. And you talked
22 about the settlement and you talked about people not talking
23 to Greenville PD. I need you to explain that to me more.

24 MS. AVENS: As far as talking to Greenville PD, the
25 hospital was required to report my daughter's death to law

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1 enforcement and they reported to SBI. Is that what you're
2 talking about?

3 THE COURT: I'm trying to -- my overall point here is
4 getting this Love case that you've cited, in which the court
5 said that you have to somehow be prevented from bringing a
6 lawsuit. And I asked you how you've been prevented from
7 bringing a lawsuit, and you talked about the settlement, and
8 then you mentioned something about people not talking to the
9 Greenville police. And so I'm trying to get that second
10 point.

11 MS. AVENS: Okay. Right. When they interviewed, the
12 hospital did not let -- didn't give her any information as far
13 as who was working on the night of May 9th or the morning of
14 May 10th, what their names were, any contact. The information
15 was not given to the police or the FBI agent who was working
16 with the police because she said that -- you see that the
17 hospital did not make personnel available.

18 THE COURT: Okay. How did that harm you?

19 MS. AVENS: Because I -- what do you mean how did it
20 harm me? It corrupts the investigation for them to be allowed
21 to withhold or not provide personnel information and then for
22 law enforcement to allow the uncooperation -- or
23 noncooperation.

24 THE COURT: So again, this relates to whether you can
25 bring a lawsuit and how you've been harmed in your ability to

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1 pursue a lawsuit. So how did that -- if I assume they did
2 what you're saying and ECU told their employees not to talk to
3 the police, how did that impact your ability to bring a
4 lawsuit related to your daughter's death?

5 MS. AVENS: Because that may have given me the
6 evidence to bring this case sooner instead of ten years later.
7 That happened back in 2014. I didn't know. I didn't have the
8 tangible evidence to make it pass, conclusory-type statements.
9 But if I would have had this knowledge, then that was an
10 avenue that maybe I could have pursued sooner rather than
11 later.

12 THE COURT: But you are pursuing it now?

13 MS. AVENS: Yes.

14 THE COURT: All right. Thank you.

15 Ms. Carreiro, late in your brief on page 21, you
16 say -- you're talking about Ms. Avens' negligence per se
17 claim. And you say, "second negligence per se and the
18 continuing wrong doctrine relate to tort claims", none of
19 which plaintiff appears to bring in this suit. And I'm
20 confused by that, because on page 70 of her complaint, there
21 is clearly a claim for negligence per se. So I'm trying to
22 understand your argument there.

23 MS. AGOSTO CARREIRO: Your Honor, my understanding is
24 with respect to the actual claims that Ms. Avens was bringing
25 had to do with -- excuse me, lack of a thorough investigation.

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1 That there was conspiracy or obstruction of justice, and
2 hiding some of the evidence in the case, that there was a
3 First Amendment violation and a 14th Amendment violation. To
4 the extent that she may have brought up negligence per se, it
5 certainly wasn't clear to me upon reading the amended
6 complaint what exactly that negligence per se was trying to
7 allege.

8 I would also say, Your Honor, that, at least in North
9 Carolina, any kind of negligence tort claims would not be
10 going through Superior Court. It would be going through the
11 Industrial Commission. And so we would certainly argue that
12 that would not be an appropriate claim to bring in this court,
13 Your Honor, that, if anything, it would be a state claim
14 brought in the Industrial Commission but would not invoke the
15 jurisdiction of this courtroom.

16 So I don't have -- I apologize, I don't have that
17 specific amended complaint printed out in front of me. And I
18 was not allowed to bring in my phone or laptop into the
19 courtroom, so I can't pull that up, Your Honor. But with
20 respect to the negligence per se claim, there's nothing that I
21 can see in the facts that she alleged that would have brought
22 that up. I mean, if anything, Ms. Avens makes some conclusory
23 arguments or conclusory statements about how there was this
24 intention, this collusion on behalf of DA Dixon to hide
25 information from her, that he lied to her, and kind of other

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1 types of allegations along those lines. And that would not be
2 in line with what a negligence per se claim is, Your Honor.

3 So I think that the allegations and facts that she's
4 alleging in her complaint, in and of themselves, would count
5 against and would kind of contradict any claim for negligence
6 per se.

7 THE COURT: So you're telling me even an individual
8 capacity claim against the DA for negligence per se has to go
9 in front of the Industrial Commission?

10 MS. AGOSTO CARREIRO: Under North Carolina law, yes,
11 Your Honor, it would be. Specifically, negligence claims are
12 the exclusive jurisdiction of the Industrial Commission under
13 the state scheme, Your Honor. And those would not ever be
14 brought against the state in Superior Court.

15 The other thing I would say, Your Honor, is that the
16 Love v. Bolinger case, which, you know, I'm sure you're aware
17 of this, having already read the case and asked questions
18 about it to Ms. Avens, that is a case out of the Southern
19 District of Indiana. And so it's certainly defendant's
20 position that it's not binding on this Court. And in fact,
21 it's not persuasive. It's pretty much a different set of
22 facts and circumstances. However, if you were to go along
23 with the holding in this case, you know, Ms. Avens really
24 hasn't identified how she was deprived of access to the courts
25 or how any of what she was discussing with respect to what

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1 happened in 2014 or 2015 was the result of anything that DA
2 Dixon did. He wasn't the elected DA until 2019, five years
3 later. So we think that Love really isn't an appropriate case
4 to guide your decision in the case. But as I said, even if it
5 were, Ms. Avens doesn't satisfy the requirements or factors
6 that the Southern District of Indiana is seeking.

7 THE COURT: Thank you.

8 Ms. Avens, anything you wish to be heard on, on the
9 points we've just discussed?

10 MS. AVENS: Yes, sir, Your Honor. State v. Wright
11 identified obstruction of justice as anything that hinders or
12 impedes the judicial process. Okay. And District Attorney,
13 first Dixon, first of all, as far as the negligence per se, I
14 can bring that in with my current case under supplemental
15 jurisdiction, if I'm not mistaken, sir.

16 THE COURT: I mean, I understand that's your
17 argument, yes.

18 MS. AVENS: Yes, that's my argument under
19 supplemental jurisdiction, because, again, it is a civil
20 rights case. The -- I've lost my train of thought. I'm
21 sorry. Can you ask me the question again?

22 THE COURT: Well, Ms. Carreiro talked about a bunch
23 of different things. I was just wanting to see if you had any
24 response to them. Most of what she talked about was the
25 negligence per se issue, which you've addressed in terms of

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1 the -- where it can be brought. She argued that negligent --
2 it doesn't establish negligence per se either. I'm happy to
3 hear from you on that point if you want to discuss it.

4 MS. AVENS: Well, negligence per se is when
5 negligence that resulted from a criminal act, if I'm not
6 mistaken. For example, if somebody was speeding or driving
7 drunk and was in an accident and hurt somebody, it's assumed
8 that they were already doing something illegal when they did
9 what they did that caused harm to somebody. So negligence per
10 se would come into question. And that was why I brought it
11 into this case, which that particular argument can be dropped
12 if it's not necessary because it doesn't -- it's not part of
13 the motions to dismiss. I mean, it's not an affirmative
14 defense or whatever that will cause dismissal of the case.
15 But it still doesn't change the fact that the defendant still
16 obstructed justice.

17 For about a year and a half, he claimed to rely on
18 the necessity of a medical examiner's report so that he could
19 decide how he was going to move forward in the case, claiming
20 first that he already had a report that he did not have, after
21 it was discovered that he was -- that he lied about it, then,
22 okay, well, I'm going to submit the evidence to the medical
23 examiner, but I thought you said do you want me to submit it
24 or not? Okay.

25 After that, the medical examiner had people in their

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1 office who were told not to talk to me anymore because the
2 office manager is how I learned that the DA had lied about
3 having the report that he didn't have. So further calls to
4 them resulted in, Ms. Avens, I was told that, if you call, to
5 tell you that you need to contact risk management. All the
6 way up until 2023, when I called and the office manager
7 answered the phone, she made reference to the same thing, but
8 yet still she did talk to me and she's telling me again, we
9 don't have anything in our office, we don't have anything in
10 our system. Same thing that she had told me in 2022. Even
11 though the DA claimed that he sent evidence to her in August
12 2022.

13 So after then, then that's when I started recording
14 the phone calls, because that would make two times that he --
15 you know, that he's lying about what he did, sending evidence
16 or receiving reports.

17 And in the next conversation that I recorded from him
18 and he was saying how that, okay, well, he sent it to the
19 medical examiner's office. Nobody was interviewed previously
20 because nobody believed a crime happened, even though CALEA's
21 standard says that, at the minimum, the complainant, the
22 witnesses, and suspects are to be located and interviewed and
23 followed up with at a minimum of an investigation. It says at
24 a minimum in their standards. These things did not occur.

25 And then he -- like I said, he further -- and send

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1 the transcripts. He further placed his weight on needing this
2 report from the medical examiner, which never happened. He
3 never required her to cooperate with his so-called
4 investigation since he said that any response from her will be
5 a part of the investigation. He never required her to
6 cooperate or to give her opinion, outside this six months,
7 even after then, October 2023. When her office worker tells
8 me that, oh, well, Dr. Kelly forgot. Where is Attorney Dixon?
9 He's not asking for this. He said he needed this. He said he
10 needed this report.

11 So from August 2022 to October 2023, there's still no
12 report from medical examiner. Attorney Dixon is still not
13 doing his part since he said he needed this report. Prompted
14 me to hire an independent medical examiner. I got that back
15 in January, forwarded to the DA's office and the Greenville
16 police. We're going to close the case now. Insufficient
17 evidence. Even though the independent medical examiner said
18 that our daughter's death was homicide based on criminal
19 negligence.

20 So he put all this emphasis for well over a year on
21 needing this report from the medical examiner, just to close
22 the case when he gets a report from the independent medical
23 examiner. Which begs the question, what did you expect Dr.
24 Kelly's report to say had she given one? If she said
25 homicide, were you still going to close the case? Where was

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1 this necessary?

2 THE COURT: Thank you.

3 Ms. Carreiro, anything final from -- on DA Dixon's
4 motion?

5 MS. AGOSTO CARREIRO: Yes, Your Honor, just a couple
6 of things. First, to the extent that Ms. Avens was talking
7 about, you know, criminal negligence, I don't believe that an
8 American citizen has the right to initiate criminal charges
9 against another citizen.

10 THE COURT: Doesn't North Carolina recognize citizen
11 complaints?

12 MS. AGOSTO CARREIRO: It does, Your Honor. There are
13 citizen-initiated warrants.

14 THE COURT: Like citizens can go to a magistrate and
15 put forward probable cause in an affidavit and have an
16 affidavit from a law enforcement officer or some independent
17 person and seek a warrant or a summons; isn't that part of
18 North Carolina law?

19 MS. AGOSTO CARREIRO: It is part of North Carolina
20 law, Your Honor. It would require an independent
21 determination of probable cause by a magistrate. And I
22 believe all one hundred counties in North Carolina don't allow
23 felony charges to be initiated by a citizen. They require an
24 independent investigation be done by law enforcement agency.
25 I just didn't know whether Ms. Avens was talking about trying

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1 to institute some kind of criminal charges under a federal
2 statute against DA Dixon.

3 THE COURT: Well, individuals can't do that. Only
4 the U.S. Attorney can do that. So that's not at play here.

5 MS. AGOSTO CARREIRO: Yes, Your Honor. The other
6 thing is that my colleague did bring to my attention, and I've
7 not specifically read the case, Your Honor, but there is a
8 North Carolina State Supreme Court case which specifically
9 says that the negligence per se doctrine applies only to
10 violations of public safety statutes. And so I believe that
11 that's similar to what Ms. Avens was saying with respect to,
12 you know, speeding and that kind of a thing but not with
13 respect to something like a criminal conspiracy, Your Honor.

14 And I don't believe that Ms. Avens was alleging any
15 kind of public safety violation that DA Dixon, that his
16 actions, you know, amounted to any kind of public safety
17 violation. And so that's another reason, Your Honor, that her
18 negligence per se claim doesn't really stand.

19 And there were a couple other things that we brought
20 up in the motion to dismiss. I just want to, you know, say
21 them for the record. Not only would absolute prosecutorial
22 immunity bar the claim and qualified immunity, as I stated,
23 but also sovereign immunity, Your Honor, under the Eleventh
24 Amendment, that would also be a bar to these types of claims
25 against DA Dixon in his official capacity, and that

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1 prosecutorial immunity would protect him under any personal
2 capacity. And in any event, we still stand by the argument
3 that Ms. Avens does not have standing to bring this claim.

4 THE COURT: Thank you.

5 MS. AGOSTO CARREIRO: Thank you, Your Honor.

6 THE COURT: That reminded me of one other question I
7 wanted to ask Ms. Avens, the Eleventh Amendment issue. You
8 talk about the ex parte Young doctrine, and that requires --
9 that allows courts to enjoin state officials from ongoing
10 violations of federal law. And I just want you to articulate
11 for me what is the ongoing violation of federal law you
12 contend the Court needs to stop the defendants from doing
13 here.

14 MS. AVENS: Yes, sir. I had not identified anything
15 to use under the ex parte Young order at, but I didn't know if
16 something would be discovered during discovery where I could
17 try to seek some type of injunction relief or something of
18 that nature from the Court. So I left that as something that,
19 in case there's something comes up during discovery that would
20 allow me to use that and, you know, so that they can't -- no
21 one can say, well, she didn't say that in her pleadings that
22 she would, you know, exercise this.

23 But as far as the investigation or criminal
24 investigation goes into the death of my daughter, that was
25 something that I was hoping to negotiate for during

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1 negotiations, when and if we have them, you know, if the case
2 is not dismissed. That is something that could be brought
3 into the conversation with Attorney Dixon and his counsel as
4 part of a settlement: Would he be willing to use his
5 resources to bring a special prosecutor into the case to take
6 over the investigation of my daughter's death?

7 THE COURT: Thank you.

8 I want to move on to Dr. Kelly's motion to dismiss.
9 Just at the outset, Mr. Lindsley, are you arguing the standing
10 argument that DA Dixon raised applies to your client as well
11 and, if so, why?

12 MR. LINDSLEY: I would suggest to the Court that it
13 applies only to the extent that there might be suggestion in
14 parts of the complaint that plaintiff is seeking to have Dr.
15 Kelly -- to force Dr. Kelly to engage in a review of records
16 to the end that, you know, she's seeking a criminal
17 prosecution. And Dr. Kelly doesn't have a role in such an
18 action of criminal prosecution. So there's no claim against
19 Dr. Kelly in terms of trying to obtain a criminal prosecution
20 through this case. But other than that, it doesn't apply to
21 Dr. Kelly.

22 THE COURT: Okay. A lot of the arguments are
23 predicated on Dr. Kelly being a state official and not a local
24 official. Where do I look for that authority?

25 MR. LINDSLEY: That's in the State statutes. I

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1 apologize to Your Honor. I didn't anticipate that question.

2 I don't have the statutory reference top of mind at the

3 moment, but it is set out in state law.

4 THE COURT: So the state medical examiner, I believe;

5 is that correct?

6 MR. LINDSLEY: That's correct.

7 THE COURT: And does that person appoint Dr. Kelly?

8 MR. LINDSLEY: Right.

9 THE COURT: And is her jurisdiction county based; is
10 it regional?

11 MR. LINDSLEY: It's regional. So she serves in
12 multiple counties.

13 THE COURT: And the state ME appoints her to that
14 authority?

15 MR. LINDSLEY: Right.

16 THE COURT: It doesn't seem to be in dispute between
17 the parties. I just need a clarification on that --

18 MR. LINDSLEY: Yes, sir.

19 THE COURT: -- point. Thank you.

20 Ms. Avens, I'm trying to understand your First
21 Amendment claim against Dr. Kelly. It involves her failure to
22 provide her expert opinion to you. And you say in your
23 complaint that, through the nature of her job, she's
24 ordinarily a willing speaker. However, her failure to perform
25 her governmental- or state-mandated duties demonstrated her

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1 subservience to ECU Health by allowing the facility to dictate
2 which cases she was to work on without first requiring their
3 approval, thereby chilling the speech of an otherwise willing
4 speaker.

5 And I want you to tell me if I'm wrong about this,
6 but I think what you are arguing is that Dr. Kelly has chilled
7 her own speech. And I don't -- and if that is what you're
8 arguing, I need you to explain to me how that's a First
9 Amendment violation for Dr. Kelly to have decided not to speak
10 in a particular circumstance.

11 MS. AVENS: Yes, sir. Dr. Kelly being a medical
12 examiner for -- you said district -- area medical examiner,
13 when cases are given to her, then she gives her opinion based
14 on her assessment, her review, her investigation, or whatever
15 means that she used to come up with whatever that was
16 necessary for that case, whether it's manner of death, cause
17 of death, you know, or things that support such decisions.

18 In this case, she did not do that. She was given the
19 information, I assume, because first Dixon said that he gave
20 it to her on August 11th -- that he submitted it to her on
21 August 11th by email. That was in 2022. But then in April,
22 after the office manager said that she didn't have -- that
23 they didn't have anything in their system. Then he sent it
24 again that day while I was still on the telephone with him.
25 And then I followed up with the medical examiner's office

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1 after the fact to make sure that they did receive this
2 information this time. And they did.

3 So he's given her information that, according to him,
4 he expects a response from. So because he said he needed this
5 response to determine whether or not he would move forward
6 with charges. So it's only logical to assume that she will
7 participate in an investigation supposedly led by the District
8 Attorney when he submitted evidence to her. And then to turn
9 around and not cooperate denies me of information because that
10 was something that had not been done.

11 The information had been sent to Dr. Radisch, but she
12 made her decision based on incomplete evidence, because more
13 information came out after she made her decision. So in my
14 opinion -- and I don't feel like it's an unfair opinion or
15 unreasonable opinion to assume that her initial decision may
16 have been or was flawed because she was not privileged to
17 other information that came out later. Dr. Kelly was
18 privileged to this information because DA Dixon said that he
19 submitted everything to her.

20 So now there's an expectation that she will comply
21 with his investigation, that he titled as an investigation,
22 and provide her information. Because she did not do that,
23 then I was compelled to hire an independent medical examiner.

24 THE COURT: I mean, I understand everything you've
25 said. I'm just trying to understand how you believe that

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1 violates your First Amendment rights. I mean --

2 MS. AVENS: Because --

3 THE COURT: -- what I've heard you say is Dr. Kelly
4 should have done an evaluation of the new evidence and then
5 told the DA what her finding was. And if I assume you're
6 right about that, how does that violate your First Amendment
7 rights?

8 MS. AVENS: Because the First Amendment rights is
9 reciprocal, where you can receive information as well as give
10 information. She did not give the information.

11 THE COURT: Thank you.

12 Mr. Lindsley, do you wish to respond to that?

13 MR. LINDSLEY: Yeah. Thank you, Your Honor.

14 I think Your Honor's question is directly on point
15 here. And I'll point, Your Honor, to the case that plaintiff
16 herself cites in her complaint, Martin v. U.S. Environmental
17 Protection Agency, the case out of the District Court for the
18 District of Columbia, where I believe plaintiff is basing her
19 claim here. And although there is a reciprocal right under
20 the First Amendment not only to speak but to receive
21 information, a party does not have the right simply to
22 command, from the government, information. That's not what
23 this principle as espoused in the Martin case is about.

24 Instead, if otherwise willing speaker is chilled by a
25 third party against speaking and that third party is a

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1 government agency, then a First Amendment right based in
2 receiving information may be implicated. That's not the
3 situation that we have here. Dr. Kelly is the speaker, if you
4 will. And first, there's no inclination -- there's no
5 evidence suggesting that she was a willing speaker on the
6 first hand. And on the second hand, if there were some
7 evidence of chilling of her speech, Dr. Kelly herself is not
8 the correct target. It's some other party, some other person
9 who's responsible for chilling her speech. That would be the
10 implicated defendant, if you will, under this First Amendment
11 right to receive information theory.

12 THE COURT: I mean, as I take Ms. Avens, what she
13 shared is that she believes Dr. Kelly should have done the
14 investigation the DA asked her to do or wanted her to do and
15 then reported the results back to either the DA or to Ms.
16 Avens herself and that that is what violates their rights.
17 And just the medical examiners have an obligation to do this
18 sort of work?

19 MR. LINDSLEY: The medical examiner has certain
20 duties under statute. If a district attorney were to ask for
21 a record review, I don't know that that's necessarily a
22 statutory duty. You know, if it's within the confines of her
23 mandate, perhaps, but there's no evidence in the case that
24 it's within her mandate to perform a record review after
25 another medical examiner, in this case, the chief medical

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1 examiner, has already made a determination which was done
2 early on in this case.

3 So whether or not she has a statutory obligation or
4 duty, there's certainly no allegation other than conjecture on
5 the part of Ms. Avens of the existence of such a duty. And
6 even if she didn't perform the duty, that doesn't -- it still
7 doesn't implicate a First Amendment right possessed by Ms.
8 Avens in not receiving the information.

9 Certainly, I think we'd be hard pressed to find any
10 statutory duty to report her findings directly to a member of
11 the public, even if that member of the public requested it.
12 Whether or not she would have a duty to report it to the
13 district attorney is another matter. But here, based on the
14 allegations in the complaint and this Martin case, there
15 simply is not a First Amendment right that Ms. Avens can claim
16 for not receiving information from Dr. Kelly.

17 THE COURT: Thank you.

18 Ms. Avens, you also alleged that Dr. Kelly violated
19 your Fourteenth Amendment rights to due process and equal
20 protection. And I'm trying to understand that argument. So I
21 want to start with due process and then we'll talk about equal
22 protection after that.

23 How do you believe Dr. Kelly not doing this
24 additional work violated your due process rights?

25 MS. AVENS: Yes, sir, Your Honor. Because she -- my

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1 understanding for the due process part goes along with the
2 investigation that Faris Dixon was conducting, you know, and
3 then he, you know, end up, you know, closing the case. So
4 part of -- which I know she didn't close the case. That was
5 his doing when he closed it in January -- early this year when
6 that happened. But still, I feel like, because she was given
7 the evidence to cooperate with an investigation, that that is
8 part of the process due so that the DA could make a charging
9 decision based on the information. So that was my line of
10 reasoning for the due process.

11 THE COURT: And on equal protection, you indicate --
12 you say in your complaint that Dr. Kelly's conduct resulted in
13 a denial of your right to equal protection under the law, as
14 you were not treated with the same impartiality and diligence
15 that other similarly situated individuals would receive. And
16 what I'm curious about is that last portion. You say that
17 other similarly situated individuals would receive different
18 treatment, and I'm trying to find allegations in your
19 complaint that support that.

20 MS. AVENS: The differential treatment would come
21 from any case that she has cooperated with investigation by
22 the district attorney.

23 THE COURT: Are you aware --

24 MS. AVENS: Is --

25 THE COURT: -- if there are any such cases?

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1 MS. AVENS: Excuse me?

2 THE COURT: Are you aware of there actually being any
3 such cases like that?

4 MS. AVENS: I have not done that type of research to
5 see what other cases might be, but I know that there are
6 homicide cases prosecuted in the Pitt County Courthouse, where
7 many of those cases, especially if they happen, you know, like
8 some type of suspicious circumstance or suspected murder
9 circumstance, that it would be her office that is brought in
10 to investigate and evaluate and to make that determination if
11 it's a homicide or not or if it's suicide or whatever the
12 manner she chooses.

13 So if she is participating in these other cases that
14 are brought before the Court -- because again, when these
15 situations arise, people are prosecuted, they need the opinion
16 from the medical examiner to support what the cause of death
17 was, how the person died, what was the manner. In this case
18 that did not happen. So I might not pinpoint this case, this
19 case, or this case, but to require me to pinpoint those will
20 also be, to me, the same as saying that there aren't any that
21 she has cooperated with, and that's unreasonable.

22 THE COURT: And again, in your complaint, are there
23 allegations that I can look at that establish somehow that Dr.
24 Kelly was doing this on the base of some sort of protected
25 characteristic you have: your race, your gender, one of those

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1 sort of things? Can I look for any allegations in the
2 complaint on that basis?

3 MS. AVENS: I did not accuse Dr. Kelly of anything
4 like that. Only ECU Health. I did not accuse her of any type
5 of discrimination. Neither did I accuse DA Dixon of any type
6 of discrimination. That doesn't mean that something will not
7 be shown during discovery if the case should proceed to there,
8 but I do believe that she cooperated with ECU Health to
9 benefit ECU Health, and that ECU Health motives were
10 discriminatory.

11 THE COURT: Thank you.

12 Mr. Lindsley, any response?

13 MR. LINDSLEY: Only to say, Your Honor, that the
14 amended complaint does not allege sufficient facts to
15 establish any violation of due process or of equal protection
16 in the case. You bring up the lack of comparators in the
17 complaint. There's no evidence alleged that any other person
18 in Ms. Avens' position was treated differently than she has
19 been by Dr. Kelly. It's just not there. So on the face of
20 the complaint, there just is not sufficient allegations to
21 establish those claims against Dr. Kelly. That's all.

22 THE COURT: Thank you.

23 Ms. Avens, any final comments you'd like to share
24 regarding Dr. Kelly?

25 MS. AVENS: Yes, sir. As far as the -- I wanted to

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1 get back to the willing speaker. She's a willing speaker, by
2 the nature of her job. She writes opinions based on her
3 investigation and provides these opinions. As far as whether
4 or not there's any statute or right for the public to get a
5 copy of these opinions, when Dr. Radisch investigated
6 initially, I was able to communicate directly with Dr.
7 Radisch, and Dr. Radisch sent me a copy of her decision. So
8 whether or not it is a right for that, I don't know. But it
9 is a practice that the decision of the medical examiner is
10 released to the -- I guess the closest relative or the --
11 whoever the administrator of the estate may be. I'm not sure
12 exactly which one of those little nuances work there, but she
13 did send me a copy of the letter as well. It wasn't just sent
14 to Kimberly Robb.

15 And then in terms of chilling the speech, if she is
16 required to seek permission from ECU Health Risk Management
17 and attorneys before being allowed to work on this case, then
18 yes, her speech has been chilled.

19 THE COURT: Let me --

20 MS. AVENS: Because --

21 THE COURT: Let me ask you about that because
22 that's -- it's getting into ECU. And I'm going to give Mr.
23 Lindsley a chance to make any final comments. But I know
24 there's the -- you allege that you called the medical
25 examiner's office, and one or more people who answered the

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1 phone said, I'm supposed to refer you to ECU Risk Management.

2 MS. AVENS: Yes.

3 THE COURT: And I'm trying to understand where in the
4 complaint there's an allegation that establishes that that was
5 done, because ECU said to do it that way or because the
6 medical examiner's office said to do it that way. Because
7 it's possible, certainly, you know, you've alleged that this
8 is some -- or you've discussed that somehow it's ECU telling
9 the medical examiner to refer you to their office, but it's
10 also equally possible the medical examiner said, next time Ms.
11 Avens calls, tell her to call ECU, because, you know, that's
12 where all of this happened.

13 So what allegation do I look at in the complaint to
14 establish that it was ECU's doing that the medical examiner
15 was referring you back to ECU?

16 MS. AVENS: When that first started happening, those
17 calls -- redirection of calls, they did start happening right
18 after it was discovered that DA Dixon had lied about having
19 the report. I don't know at what point this particular
20 instruction was given. I just know that the next time I
21 contacted that office in September 2022 and October 2022, that
22 those are the responses that I was given.

23 And then in 2023, when I spoke with the office
24 manager, in one of the recorded conversations, she told me
25 that that I was supposed to be talking to Risk Management.

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1 And then she went on to tell me how Dr. Kelly -- and she kept
2 saying that we are not doing anything with this case. And
3 then she went on to tell me that Dr. Kelly would need to talk
4 to Risk and the attorneys to see what she would be allowed to
5 do. And I know that's not the way it works either. So if she
6 has to talk to Risk Management and ECU Health's attorneys to
7 see what she would be allowed to do when she is expected to
8 perform her job duties independently and without outside
9 influence, then that's where the rerouting of the
10 conversations and everything comes back to, because that
11 office is now being controlled under ECU Health, because she
12 should not have to get permission from anybody to perform her
13 job functions to the public.

14 THE COURT: Thank you. All right.

15 So Mr. Lindsley, any final comments?

16 MR. LINDSLEY: Yes, sir. Just to return to that
17 First Amendment issue. Even if Dr. Kelly's speech were
18 chilled and even if it were chilled by a government agent, Dr.
19 Kelly is not the correct target for a claim for First
20 Amendment violation. She herself is the, quote/unquote,
21 willing speaker or potentially willing speaker.

22 The plaintiff, in her complaint, clearly brings a
23 First Amendment violation claim against Dr. Kelly, and it just
24 does not lie under the case law against Dr. Kelly. It may
25 potentially lie against some other person or some other

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1 government office but not against Dr. Kelly.

2 And I just wanted to conclude by bringing up that
3 plaintiff has also made a negligence per se claim against Dr.
4 Kelly. I'll just briefly address that. In particular, you
5 know, under state law, there are a number of requirements that
6 must be shown to make out a case for negligence per se,
7 including a duty created by a statute. The statute was
8 enacted to protect the class of persons, which includes the
9 plaintiff, a breach of the statutory duty, an injury sustained
10 by that breach, the injury was of the nature contemplated by
11 the statute, and a violation of the statute proximately caused
12 the injury.

13 I would suggest to Your Honor that plaintiff's
14 complaint doesn't establish any of those elements in the
15 context of her allegations. And as my counsel to my left
16 indicated earlier that negligence per se claims, really at
17 their heart, address matters of public safety statutes,
18 plaintiff does not allege or identify any such statute that
19 Dr. Kelly could have breached or did breach. And on those
20 bases, the claim for negligence per se is invalid. I mean,
21 there simply is nothing in the complaint to sustain a claim
22 for negligence per se against Dr. Kelly.

23 THE COURT: Thank you.

24 MS. AVENS: Can I respond?

25 THE COURT: Yes, ma'am.

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1 MS. AVENS: Yes, sir. I would like to make a quick
2 response to that. As far as the negligence per se, there are
3 safety codes that people like, I guess, the medical examiner
4 and other state officials are -- or different agencies, there
5 are safety codes that they still have to adhere to. I was not
6 able to come up with the particular safety codes or codes of
7 ethics or other things similar to that for the North Carolina
8 Medical Examiner's Office. That is something that I am hoping
9 to be able to come up with during discovery. But it has
10 already been determined in some other cases that these --
11 violations of these particular standards still can constitute
12 negligence per se. Because it might not be an actual North
13 Carolina general statutes standard, but it still may be a
14 legal standard that she is obligated to follow.

15 I did submit as an exhibit a list of those standards
16 that I was able to find from a different, I guess, state -- I
17 can't remember, but I have yet to find one for -- that applies
18 here to Dr. Kelly in North Carolina. But I would also find it
19 difficult to believe that the standards vary that much from
20 place to place, based on the standards that the medical
21 examiner is held to.

22 THE COURT: Thank you.

23 So let's talk about ECU. Finally, Mr. McClurg, you
24 discussed the statute of limitations and say this is all
25 barred by the statute of limitations. Ms. Avens responds that

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1 there are these allegations about ECU meddling in the medical
2 examiner's office and that part of a continuing wrong against
3 her. If I accept those allegations as true, is her case
4 timely?

5 MR. MCCLURG: If you accept them as true and not
6 conclusory, Your Honor?

7 THE COURT: Right. I mean, given where we are in
8 this case --

9 MR. MCCLURG: Right.

10 THE COURT: -- if I accept the well-pleaded factual
11 allegation is true, if I find that those well-pleaded
12 allegations are that ECU meddled with the medical examiner in
13 2022, is this case timely?

14 MR. MCCLURG: I still don't believe so. I mean, the
15 underlying claims are all arising out of facts that occurred
16 back in 2014, 2016. The conclusory allegations that took
17 place in 2022 are completely separate and distinct from all of
18 the allegations that specifically relate to ECU Health.
19 They're not a part of the same course of conduct, and they're
20 a decade apart in time.

21 THE COURT: If her allegation is that there's this
22 conspiracy amongst the three defendants here to cover up this,
23 this -- what she contends was a murder or, I presume, ECU's
24 reputational benefit in the community. I mean, that seems to
25 be the general gist of what she's arguing. I understand your

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1 client would disagree with that, but --

2 MR. MCCLURG: Right.

3 THE COURT: -- if I accept that, isn't the case
4 timely if it's been a ten-year-long conspiracy?

5 MR. MCCLURG: I would say there still needs to be a
6 meeting of the minds and the acts that have occurred allegedly
7 in 2022 could be attributable to something else other than ECU
8 Health directing the ME's office. As Your Honor noted
9 earlier, it could have just been passing the buck off to ECU
10 Health, not at their direction. So I don't think that that
11 would revive a claim that expired in 2017.

12 THE COURT: Thank you.

13 Ms. Avens, do you wish to be heard on that at all?

14 MS. AVENS: Yes, sir. First of all, the claim would
15 not have expired in 2017, even if there was nothing new in the
16 more recent years. It would have been -- if there was nothing
17 else, my opinion in 2019, but that's not the issue. The issue
18 is that they have been involved since then and I didn't make
19 up the information. This is the information that was given
20 from the medical examiner's office.

21 And the conduct, even though counsel is saying that
22 it's different conduct -- the conduct is still the same, to
23 keep my daughter's death swept under the rug -- there has
24 still been an obstruction of justice. There is meeting of the
25 minds, because if they require Dr. Kelly to need their

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1 permission before working on a case, then their minds are met
2 because she agreed. Because evidently, she didn't never
3 review the evidence or compile a report based on her review of
4 the evidence. So her compliance, that's the meeting of the
5 minds right there.

6 THE COURT: Thank you.

7 Mr. McClurg, there's been discussion in your brief
8 about whether ECU is a state actor, and I appreciate that
9 numerous other cases ECU has been found to be a private actor
10 and not a state actor. But again, if I find that the well-
11 pleaded complaints here allege that ECU was conspiring with
12 two state actors to cover up this death, does that make ECU a
13 state actor in this case, under those facts?

14 MR. MCCLURG: Not necessarily, Your Honor. It has to
15 be controlled that the State is exercising over the entity.
16 Here, there are conclusory allegations that ECU Health is
17 somehow exercising control over some State decision. So I
18 don't believe that would be sufficient.

19 THE COURT: Again, I understand your client disagrees
20 with all of this.

21 MR. MCCLURG: Right.

22 THE COURT: But if your client is effectively in
23 control of the DA and in control of the medical examiner, does
24 that not make them a state actor?

25 MR. MCCLURG: I think it likely would, Your Honor.

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1 THE COURT: Thank you.

2 Ms. Avens, any thoughts on that point?

3 MS. AVENS: Just in direct response to what he said,
4 or -- because you said you already have everything else.

5 THE COURT: Well, I'm asking him, if I accept -- if I
6 find that you have properly pled that there is this
7 conspiracy, does it make them a state actor? And that was the
8 question I asked him. And he generally said, if I fully
9 accept everything that you've argued, then they would be a
10 state actor. Do you wish to be heard on that at all?

11 MS. AVENS: Well, I mean, I think that they did act
12 not just in the instances that he referenced, even going back
13 to the reporting to the SBI. I believe that was them acting
14 as a State, considering that they took advantage of a loophole
15 where the requirement was that certain deaths ought to be
16 reported to the medical examiner, and that is even listed in
17 the North Carolina General Statute 130A-383. That says that
18 under these particular circumstances, these are supposed to be
19 reported to the medical examiner. You know, it says,
20 "Occurring under any suspicious, unusual, or unnatural
21 circumstance, the medical examiner of the county in which the
22 body is deceased is found, shall be notified by the physician
23 in attendance, hospital," et cetera.

24 Considering that my daughter was not expected to die
25 at 1 a.m. on May 10th, when I spoke with the nurse

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1 practitioner because she was showing symptoms that I was not
2 used to, and I asked him, do I need to be prepared myself? He
3 said no. He looked back at her chart and said that me and her
4 physicians, we believe -- or we expect her condition to
5 improve. So they had not given up care or put her on hospice
6 or end of life measures; they expected her condition to
7 improve.

8 So when she did die, and illustrates that
9 necessitated this death to be referred to the medical
10 examiner's office, which was not done. And then it also
11 necessitated a report to law enforcement. Maybe the people
12 who wrote that particular rule didn't think it was necessary
13 to include the word local law enforcement in that requirement,
14 because the SBI being not considered local, they're supposed
15 to redirect you if you file a complaint with them or try to,
16 because I tried to file several complaints with them. They
17 always tell me that we can't do anything. You have to contact
18 your local law enforcement or your prosecutor, your district
19 attorney.

20 But in this case, ECU Health was able to not only
21 file the report with them -- and you would think that even if,
22 let's just say for -- what's that word, arguendo. Let's just
23 say for arguendo that they thought they were calling the right
24 law enforcement agency. They did not call the local SBI
25 office. You would think that, even if they assumed that, they

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1 would have called the local office. No, they called agents
2 who were not local to the SBI office here in Greenville.

3 And then you would think that maybe they would just
4 report to one SBI agent. They reported to three SBI agents
5 who were not local to the SBI office here in Greenville, North
6 Carolina. And then the conversation continued. They were not
7 redirected to report to local law enforcement. The three
8 agents denied to me anything about my daughter's case, her
9 name, spoken with Vicki Haddock, spoken with anybody from the
10 hospital. But yet took the information that I gave them and
11 gave it back to the hospital. That has put through their own
12 cooperation or meeting of the minds ECU Health as a state
13 actor, because according to the SBI, they can only be brought
14 in on cases when they are asked to do so by a state agency.

15 So how did ECU Health get the privilege to report to
16 them, maintain communication with them, exchange and receive
17 information from them? Under the circumstances that the SBI
18 is only to be brought in by a state agency. ECU Health had to
19 be acting as a state to have this privilege with those SBI
20 agents.

21 So that goes, in addition, to managing the medical
22 examiner's office and also with controlling the subsequent
23 investigation under Chief Hassan Aden in November 2014 that
24 was supposed to take place where witnesses were withheld or
25 employees or personnel was not made available, because for

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1 them to allow that uncooperation means that there's got to be
2 a meeting of those minds because they were trained according
3 to CALEA standards to interview witnesses, suspects, and
4 complainant, to locate and find these people and interview
5 them and then to follow up. And that did not happen. Our
6 family members, our witnesses we were not interviewed.

7 So they have, on multiple occasions, taken it upon
8 themselves to act as state, whether it's controlling an
9 investigation -- or, basically, I guess, that's what it boils
10 down to, controlling investigations.

11 THE COURT: Thank you.

12 So Ms. Avens, you touched on this a few minutes ago,
13 but a couple of your claims against ECU are based on a concept
14 that they've engaged in some sort of race-based discrimination
15 against you. I know at one point in your amended complaint,
16 you alleged that you and your daughter are African American
17 and most of the employees at ECU Health are White. But I'm
18 trying to find out what other allegations in the complaint
19 support your claim that this is race-based discrimination?

20 MS. AVENS: Yes, sir. Because the nurse that was
21 over my daughter's care, Linda Brixon, she is White.
22 Elizabeth Everett (ph.) is White. The hospital has not made
23 any moves whatsoever to hold these people accountable for
24 their conduct. I know Brixon was terminated, but that is not
25 the same as holding her accountable for her conduct. Because

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1 just as anybody else, if they break the law or something, you
2 would expect the law to step in, not they just get fired.

3 THE COURT: I want us to stay focused here. I mean,
4 so I understand that there are a bunch of White people on one
5 side and a bunch of African-American people on the other side.
6 What is it that you can point to that says they treated you
7 this way because you are Black?

8 MS. AVENS: I am pointing to the differential
9 treatment because they hold -- have failed to hold them
10 accountable in this case and have failed to -- for example,
11 getting back to the 2016 wrongful death settlement, using this
12 as an example, when they were going to reveal unrelated health
13 data to the jury to try to persuade the jury --

14 THE COURT: Well, I don't want to --

15 MS. AVENS: -- that my daughter was responsible.

16 THE COURT: Again, I don't want to talk about what
17 happened at mediation, because what happened at mediation is
18 confidential. So that's not supposed to be shared outside of
19 mediation. But again, what -- and as I consider your motion,
20 I'm looking at this document you filed.

21 MS. AVENS: Yes.

22 THE COURT: So where in here do I look for something
23 that says, they did this to me because of my race?

24 MS. AVENS: That's an assumption based on their
25 protection of White staff members.

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1 THE COURT: And is there anything in there talking
2 about other instances where a White person died and someone
3 was punished or anything like that that you can show me,
4 there's an allegation in here of different treatment of people
5 based on their race?

6 MS. AVENS: Well, I know that everybody that was on
7 that particular wing of the hospital that night were White,
8 and they lived. Yet the hospital is protecting the people.

9 THE COURT: So I guess, I mean, are there any
10 allegations here that White people died and they did prosecute
11 that nurse or things of that nature? I'm trying to get at --
12 I mean, I very much understand what you're saying, that the
13 people involved are of different races here, and it seems like
14 a person of a race different than yours has not been punished
15 for what you believe they should be punished for. I get that.
16 I'm trying to get at where -- what can I look to in here that
17 you filed to show me that that decision was based on race?
18 That the way you've been treated in this case -- that you
19 claim you've been treated in this case is based on race? How
20 do I find that in here?

21 MS. AVENS: The conclusion based on race was drawn
22 due to, again, the protection of these people, whether it was
23 reports to the Board of Nursing or whatever, where information
24 was withheld, there was three White workers who the hospital
25 protected and continues to protect. Whereas in this case --

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1 THE COURT: Mr. McClurg, any thoughts on this point?

2 MR. MCCLURG: Just one short point, Your Honor.

3 I would just note that the allegation that ECU Health
4 protected the White nurse involved in the care of plaintiff's
5 daughter back in 2014 is not supported. It's actually
6 contradicted by the allegations in the pleading. That nurse
7 was terminated. That nurse was reported, criminally, to law
8 enforcement, and there was a Board of Nursing report made on
9 behalf of ECU Health.

10 THE COURT: Thank you.

11 Ms. Avens, one of your claims is a Title 6 claim.
12 And I'm trying to understand what program or activity that
13 received federal financial assistance you believe you were
14 excluded or denied -- excluded from or denied the benefits of?

15 MS. AVENS: Okay. Coastal (ph.) -- I can't say right
16 off, and I'm trying to find it in my notes, sir.

17 THE COURT: As I look at your complaint -- and this
18 is on page 57 and then several pages afterwards -- it seems
19 like you're saying that because ECU, as an entity, receives
20 federal financial assistance and they've engaged in
21 discriminatory conduct, that is what you base your Title 6
22 claim on; is that correct?

23 MS. AVENS: Well, as far as any programs or things
24 like that for the Title 6, that still goes back to the
25 beginning because of the way that this particular death was

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1 handled. You know, I can't compare this to another death, for
2 example, because I don't know other people's circumstances or
3 what happened or didn't happen. But I know that under, you
4 know, just the referrals that were supposed to be made were
5 not made such as, you know, referring the decedent to the
6 medical examiner, reporting to the police, to me. Those are
7 part of their programs that they -- for family members who
8 lose somebody there under questionable circumstances. These
9 are measures that are supposed to be in place. So that is,
10 you know, a program that was not taken care of appropriately.

11 THE COURT: Thank you.

12 Mr. McClurg, any thoughts on that point?

13 MR. MCCLURG: No, Your Honor.

14 THE COURT: And Ms. Avens, you also bring a Section
15 1981 claim. And I'm trying to be clear on what -- I believe,
16 that claim involves your allegation that your right to enter
17 into contracts has been interfered with by ECU. Is that what
18 you're arguing, and if so, what contract or contracts did ECU
19 interfere with that you entered or hoped to enter?

20 MS. AVENS: Yes, sir. The settlement agreement that
21 was entered into under the circumstances that I described, as
22 well as, again, bringing this case sooner because there was
23 information hidden and which, by the way, because information
24 has been come to light this year, also should tell that
25 statute of limitations that we were discussing earlier,

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1 because again, had I been aware that personnel were not made
2 available, then through speaking with an attorney or something
3 or doing the proper research, this case could have been
4 brought about sooner than now to address those issues, but it
5 was kept in the dark.

6 THE COURT: Thank you.

7 Mr. McClurg, any thoughts on that issue?

8 MR. MCCLURG: I would just point out, Your Honor,
9 that we have not heard of a contractual interest upon which a
10 Section 1981 claim may be based.

11 THE COURT: Thank you.

12 Ms. Avens, those are all my questions on ECU. Any
13 final points you want to make regarding the ECU defendants?

14 MS. AVENS: Not that I can think of. I'm sorry. Not
15 that I can think of, Your Honor.

16 THE COURT: Thank you.

17 Mr. McClurg, any final comments?

18 MR. MCCLURG: No, Your Honor.

19 THE COURT: Well, I'm going to take these matters
20 under advisement, and I hope the issue of ruling in the not
21 terribly distant future.

22 I do want to say, Ms. Avens, I've been doing this for
23 about a decade now, and I think -- you know, and I don't know
24 which way this is going to come out. I might grant the
25 motions. I might deny the motions. I don't know. I still

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1 need to look at the law and figure it out. But I do want to
2 say that you've done a tremendous job advocating for your
3 daughter. You've made a very thorough complaint laying out
4 what you believe went on and why you believe your daughter was
5 wronged and why you believe you were wronged, and you've
6 made -- you've handled the issues raised by the defense very
7 well and better than most pro se advocates have -- pro se
8 parties do.

9 And again, I don't know how I'm going to decide the
10 motions, but I have no doubt your daughter is proud of the
11 work you've done on her behalf. So --

12 MS. AVENS: Thank you.

13 THE COURT: And again, this is -- you know, this case
14 is -- you know, obviously there was something horrible
15 happened in this case that your daughter died. I know there's
16 disputes and disagreements over what all transpired, but
17 undoubtedly this is a case in which someone who was loved
18 passed away. And you know, that is never a good thing. And I
19 certainly understand why you're fighting hard for your
20 daughter.

21 The attorneys on this side have done a fantastic job
22 for their clients, as well. But given the nature of this
23 case, I thought it was worthwhile to say that again. But rest
24 assured, the law will drive my decision, as that's my mandate
25 as a judge. But I thought that was worth saying, so.

Colloquy

1 All right, Counsel, I'll ask the court reporter to
2 prepare a chambers copy of the transcript. And as I said,
3 I'll take this under advisement. We'll be in recess.

4 THE BAILIFF: All rise. This Honorable Court is now
5 adjourned.

6 (Court is adjourned)

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Dated this 15th day of October, 2024.

/s/ 

ELANA FRIEDMAN, CDLT-160

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